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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. [redacted] 105

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO Local Union No. 13-433,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

HALPIN, HALPIN & LEEP,
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1428 West Street, Redding, California,
Counsel for Petitioner.

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 27, 1959. (Typewritten Record 259.)

OPINIONS BELOW.

The opinions of the N.L.R.B. and the Court of Appeals for the Ninth Circuit are reported as follows:

1. N.L.R.B.—Decision and Order, February 20, 1957 (R. 45) 117 N.L.R.B. 405. (App. p. 1 to p. 7.)

2. N.L.R.B.—Decision and Order, February 24, 1958. (R. 52.) (App. p. 8 to p. 12.)

3. *N.L.R.B. v. I.W.A.*, Decision of Court of Appeals August 6, 1956, 238 F. 2d 378. (App. pp. 13-14.)

4. *N.L.R.B. v. I.W.A.*, Decision of Court of Appeals, March 2, 1959, 264 F. 2d 649. (App. p. 15 to p. 36.)

(References to R. .... are to the printed record before the United States Court of Appeals for the Ninth Circuit. This is virtually the entire record certified to the Supreme Court of the United States.)

JURISDICTION.

The decree of the Court of Appeals for the Ninth Circuit was made and entered on April 27, 1959 and a copy thereof is appended to this petition in the Appendix pp. 37-38. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

The N.L.R.B. brought an unfair labor practice complaint against petitioner under the Labor Management Relations Act, 29 U.S.C. 151, *et seq.* The complaint alleged that petitioner violated the act by causing the discharge of one Charles Hatfield on May 16, 1955, although Hatfield had previously tendered his

initiation fees and dues to petitioner. This discharge, it was alleged, violated Sections 8(b)(1)(A), 8(b)(2), 8(b)(2)(6), and 8(b)(2)(7) of the Act. The Board found that the petitioner had violated the Act and the Board was sustained by the Court of Appeals for the Ninth Circuit. The Board made its decision on two alternative theories; one, any tender of dues or initiation fees made before actual discharge although admittedly made after the 30-day grace period provided by Section 8(a)(3) prevents lawful discharge; two, even though the tender was made late and petitioner could insist on discharge, it had waived its right to discharge. The second theory was not advanced by the Board until after the original and only hearing and petitioner was refused the right to present further evidence and argument on this second theory.

The Court of Appeals for the Ninth Circuit rejected the first of the Board's two theories but upheld the Board on the second theory.

Three questions are therefore presented:

1. Can the 30-day grace period provided by Section 8(a)(3) for the tender of initiation fees and dues be lengthened by an employee's unilateral tender after a demand for discharge but before actual discharge?

2. If the employee cannot unilaterally lengthen his grace period under what conditions, if any, does the union waive its irght to insist on discharge?

3. Is petitioner entitled to a hearing before the Board when the theory of the Board is changed without notice to petitioner?

STATUTES AND REGULATIONS INVOLVED.

28 U.S.C. 1254 (1);
29 U.S.C. 151, *et seq.*;
29 U.S.C. 158(a)(3);
29 U.S.C. 158(b)(1)(A);
29 U.S.C. 158(b)(2);
29 U.S.C. 158(b)(2)(6);
29 U.S.C. 158(b)(2)(7).

STATEMENT.

The facts are as follows:

1. October 4, 1950—The union and Ralph L. Smith Lumber Company (hereinafter referred to as the company) entered into a collective bargaining contract which was in effect at all times relevant to the above-entitled case. The contract contained the following provision:

> "Article II. Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the union, as a condition of employment, shall become and remain a member of the union. . . ." (R. 225.)

2. October 18, 1954—Charles R. Hatfield was employed by the company as a choker-setter. Hatfield in his capacity as a choker-setter was within the group of employees covered by the contract between the company and the union. (R. 15, 154-155, 225.)

3. November 15-30, 1954—Robert Crimmins, the business agent for the union, approached Hatfield and

two other new employees and requested that these employees join the union. The three employees asked if they might wait until the spring of 1955 to join the union as they expected to be out of work during the winter. Crimmins consented to the proposel of the three men *provided they joined the union immediately upon returning to work in the spring.* (R. 205.) [Emphasis added.]

4. May 5, 1955—Ernest Dickey, the union's shop steward, asked all three men to join the union. Two of the three agreed to join and signed check-off slips providing for the withholding of initiation fees and one month's dues from the pay checks of these two men. The third man, Charles R. Hatfield, refused to sign the application card stating he had already applied for membership. (R. 157-159.)

5. May 6, 1955—Dickey reported the conduct of Hatfield to Crimmins. Crimmins informed Herbert Johnston, a confidential employee of the company, that the union would request the discharge of Hatfield. (R. 75-77.)

6. May 6, 1955—Crimmins wrote the company a letter requesting Hatfield's discharge. (R. 226.)

7. May 9, 1955—Crimmins' letter was received by the company. (R. 68.)

8. May 9 or 10, 1955—The contents of Crimmins' letter was communicated to Walter Hansen, the woods boss for the company. (R. 176.)

9. May 10, 1955—Hansen informed Hatfield he would have to join the union or be fired. (R. 176.)

10. May 5-10, 1955—Hatfield indicated he was not interested in joining the union. He expressed his feeling in strong language. (R. 184.)

11. May 11, 1955, morning—Johnston states Hatfield asked Johnston to sign him up in the union. Johnston referred Hatfield to Dickey, the job steward. (R. 79-80.)

12. May 11, 1955, morning—Crimmins told Hansen that he was not interested in Hatfield's joining the union and that he wanted Hatfield discharged. (R. 198-199.)

13. May 11, 1955, afternoon—Johnston states Hatfield repeated the request of the morning and was directed to Dickey. (R. 82.)

14. May 11, 1955, evening—The union members working in the woods voted to support Crimmins in the stand he was taking on Hatfield. (R. 200-201.)

15. May 12, 1955, morning—Hatfield signed a document stating his intention to join the union. This document was dated May 13, 1955. (R. 85-87.)

16. May 13, 1955—Johnston approached James Gordon, a shop steward who, up to then, knew nothing about the union's demands, and persuaded Gordon to allow Hatfield to sign a checkoff slip. Hatfield signed a checkoff for initiation fees and dues from November, 1954. This slip was given to Johnston. (R. 89-98.)

17. May 13, 1955—Hatfield retracted his checkoff slip and signed a new slip allowing the checkoff of initiation fees and one month's dues. This amounted to $23.50 (R. 96-97.)

18. May 13, 1955—Johnston, in his capacity as company bookkeeper, erased a debt of $28.95 Hatfield owed the company. Johnston then debited Hatfield's account for $23.50 representing union initiation fees and one month's dues. (R. 112-116.)

19. May 13, 1955—Crimmins wrote the company a second letter demanding that Hatfield be discharged. (R. 227-228.)

20. May 17, 1955—Hansen discharged Hatfield. Hansen loaned Hatfield $100.00. None of this has been repaid. At the same time he made the loan, Hansen told Hatfield he should see an attorney. (R. 24, 180-183.)

21. June, 1955—Hatfield was rehired by the company. (R. 24, 239.)

22. July, 955—Hatfield was fired by the company for not reporting to work as a result of being arrested for distur' 'ng the peace. (R. 181.)

23. February 20, 1957—The Board in its original decision held that a late tender, if made before discharge, was valid. The Board relied on its own decision in *Technicolor Motion Picture Corporation,* 115 N.L.R.B. 1607. No mention was made of waiver or estoppel. (R. 45-52.)

24. February 24, 1958—After the United St[redacted] Court of Appeals for the Ninth Circuit issued its decision in *N.L.R.B. v. Technicolor Motion Picture Corp.,* 248 F.2d 348, the Board without notice issued a supplemental decision finding that Respondent waived its

right to discharge Hatfield for failure to make a prompt tender of his fees and dues. (R. 52-56.)

25. The Circuit Court of Appeals for the Ninth Circuit affirmed the Board's decision of February 24, 1958 "irrespective of its (the Board's) deferential disagreement with this Court on the interpretation of the Act. . . ." (App. p. 30.) The Court held that the facts disclosed waiver and that waiver was a reason for extending the 30-day grace period permitted by the Act. The Court further held that petitioner was not prejudiced by the failure of the Board to permit further hearing on its second theory of liability. (App. p. 33.)

REASONS FOR GRANTING WRIT.

This decision should be reviewed because we are here dealing with an important change in the law initiated by the Board in 1955 which has now been reviewed in four separate decisions by the United States Court of Appeals for three separate Circuits. These decisions are in hopeless conflict. In spite of this conflict, or perhaps because of this conflict, the Board has expressly indicated it intends to ignore at least two of the four decisions.

Up until 1955, the Board had construed Section 8(a)(3) of the Act to permit the discharge of employees for non-payment of dues or initiation fees unless the employees had made a tender within the 30-day grace period provided by the Act. *Chisholm-Ryder Co.*, 94 N.L.R.B. 508; *Ferro Stamping and Mfg. Co.*, 93 N.L.R.B. 1549; N.L.R.B., Nineteenth Annual Report,

p. 90; N.L.R.B., Eighteenth Annual Report, p. 41; N.L.R.B., Seventeenth Annual Report, pp. 147 and 152; N.L.R.B., Sixteenth Annual Report, p. 185.

In 1955 a majority of the Board changed this rule in the now famous *Aluminum Workers* case; *Aluminum Workers International Union*, 111 N.L.R.B. 411, 112 N.L.R.B. 619. The Board held that

> "... a full and unqualified tender made anytime prior to actual discharge, and without regard as to when the request for discharge was made, is a proper tender and subsequent discharge based upon the request is unlawful."

The United States Court of Appeals for the Seventh Circuit affirmed the Board's decision although the precise holding of the Board was not followed. The Seventh Circuit in granting enforcement of the Board's order held that a proper and valid tender of dues had been properly made before the union made an operative request for discharge, *N.L.R.B. v. Aluminum Workers International Union*, 230 F.2d 515. See also, *N.L.R.B. v. Technicolor Motion Picture Corp.*, 248 F.2d 348.

The Board in the instant case continued to follow the *Aluminum* doctrine in spite of the disapproval voiced in the *Technicolor* case and by the Court of Appeals for the Second Circuit in *I.A.M. and Lodge 1021 v. N.L.R.B.*, 247 F.2d 414. Here the Court had held flatly that the *Aluminum Workers* doctrine "is an incorrect statement of the law." (Id. at 418.) The Court of Appeals for the Second Circuit found that a union could lawfully compel the discharge of a delinquent

member under a union security agreement despite a belated tender. The Court reasoned as follows:

> "It seems clear to us that Congress did not intend that the efficacy of valid union security provisions should depend solely upon an employer's willingness to act promptly upon a request for an employee's discharge when the validity of the request is not in issue." Id. at 420.

The Board is still following the *Aluminum Workers* doctrine, presumably on the theory that where there is a conflict among the various circuits of the Court of Appeals the Board is not bound until a decision has been made by the Supreme Court of the United States. (R. 54.)

In *Technicolor Motion Picture Corporation*, 115 N.L.R.B. 1607, the Board relying without discussion on the *Aluminum Workers* case held that a discharge after tender where the request had been made before tender was invalid. The Circuit Court of Appeals for the Ninth Circuit reversed specifically stating that the Act "authorizes the execution of collective bargaining agreements which make time of the essence with regard to the tender of initiation fees within the thirty-day grace period allowed by the proviso." *Technicolor Motion Pictures Corp. v. N.L.R.B.*, 248 F. 2d 348 at 353. In the *Technicolor* case the Court of Appeals for the Ninth Circuit suggested that under some circumstances the union might be estopped from insisting on discharge. Id. at 356.

Acting in accordance with this suggestion, the Board in the instant case issued a supplemental de-

cision. The Board stated: "We have carefully re-examined and reconsidered the entire record in this case in the light of the *Technicolor* Court decision, and with all due respect to that Court, we adhere to our original decision, and our interpretation of the Act." (R. 54.) The Board then went on to find that the union in the instant case had waived its right to insist on discharge. Upon the Board's petition, the Court of Appeals for the Ninth Circuit upheld the Board at least in part on the theory of waiver. The Court stated:

> "Respondent presents its views on the theories of estoppel and waiver. We agree that this was not a situation where estoppel would lie. We have said that in our opinion it was not necessary to invoke 'waiver' to sustain the Board's order, but if such had been required we are convinced that, regardless of how the respondent spells out the elements of waiver and points out that waiver could not come into play by reason of the absence of certain of the so-called necessary elements, the acts and conduct of the union agents, especially the acceptance by Gordon of the Hatfield application for membership, together with his money for initiation fee, and the check-off card, did amount to a waiver of any 'special' instructions or authority that might have permitted him to act to the contrary." (App. pp. 33-34.)

(Parenthetically there is no evidence in the record of the acceptance of any money by Gordon or anyone else.)

The Court then distinguished the instant case from its own ruling in the *Technicolor* case and the ruling

of the Seventh Circuit in the *International Assoc. of Machinists* case. (App. p. 34.) [Apparently this last reference is a mistake as the Second Circuit decided the *Machinists* case and the Seventh Circuit decided the *Aluminum Workers* case. One way to reconcile the instant case with both the *Machinists* case and the *Aluminum Workers* case is to combine the citations. Perhaps there is no other way.] The Court gave a hint of its attitude in this matter in the following language:

> "The right to enjoy the blessings of life, liberty and the pursuit of happiness is founded on the *right to work.* Deprived of that right, man becomes a groveling animal." (App. p. 35.) [Emphasis added.]

The quoted remarks with their approval of the argument most commonly advanced in connection with the so-called "right to work" laws give some indication that the Court of Appeals for the Ninth Circuit does not altogether approve of union security provisions. The L.M.R.A. legislatively does approve the union security clause it permits. The intent of Congress should be the guide for what is permitted rather than the attitude of the judiciary. In this connection for an excellent discussion of the legislative background of the L.M.R.A. see *Technicolor Motion Picture Corp. v. N.L.R.B.*, 248 F. 2d 348.

The following is a summary of the situation to date:

1. The Board has the view that any discharge after tender is illegal although the request for discharge was made before tender.

2. The Court of Appeals for the Seventh Circuit has the view that discharge after tender is illegal provided an operative demand for discharge was not made before tender.

3. The Court of Appeals for the Second Circuit has the view that a discharge is not illegal if tender is belated.

4. The Court of Appeals for the Ninth Circuit has the view that a discharge is not illegal if tender is belated unless the union has waived late tender. What constitutes waiver has not been made clear.

Because this is a daily problem for many unions and many employers, it is important to know the law. At the present time the law is confused. It appears to petitioner that this is a situation where the Supreme Court of the United States is sooner or later going to have to settle the question. It is respectfully suggested that the sooner the better for all concerned.

The instant case provides an excellent vehicle for determining whether the Board's view of the law is correct, and if the Board is incorrect, under what circumstances the union loses its right to insist on discharge. The new doctrine of waiver should not be applied against this petitioner until it has had an opportunity to present evidence on this theory. This opportunity has been denied petitioner. With the understanding that the United States Supreme Court does not wish argument on the merits of a question in a petition for certiorari, there has not been

extended discussion here of the legal merits of this case. Such discussion may be found in the briefs filed with the Court of Appeals for the Ninth Circuit.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HALPIN, HALEIN & LEEP,
JOHN HALPIN, JR.,
Counsel for Petitioner.

(Appendix Follows.)

Appendix

United States of America
Before The National Labor Relations Board

Case No. 20-CB-408

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, LOCAL UNION 13-433 (RALPH L. SMITH LUMBER COMPANY, Employer) and CHARLES R. HATFIELD, an Individual.

DECISION AND ORDER

On January 30, 1956, the Board issued an order in this case adopting the findings, conclusions and recommendations of the Intermediate Report of Trial Examiner Howard Myers, no statement of exceptions to the Report having been timely filed. The Trial Examiner had found that the Respondent's actions in attempting to cause and actually causing the Employer to discharge the charging party, Hatfield, were violative of Sections 8 (b) (1) (A) and 8 (b) (2) of the Act. To remedy the violations found the Board ordered the Respondent to cease and desist from the conduct found to be unlawful and to take certain affirmative action.

On February 7 the Respondent moved that the Board reopen the case on the ground that its delay in filing exceptions was due to other commitments and inefficiency in mimeographing service. The Board on February 13, 1956, denied this motion as lacking in merit.

Thereafter the case was considered by the United States Court of Appeals for the Ninth Circuit upon the Board's petition for summary entry of decree. The Court, on August 6, 1956, remanded the case to the Board with directions to consider the matter on the merits "including the objections of Respondent which are in its office" inasmuch as the said objections (exceptions) had actually arrived in Washington, D. C., on the due date but were undeliverable because the Board's office was closed, and did not by their late delivery interfere with the Board's processing of the case.

In addition to its Exceptions to the Intermediate Report, the Respondent has filed a brief and a supplementary brief in support of its exceptions. Its request for oral argument was denied in the Board's aforesaid order of January 30, 1956.

Pursuant to the Court's remand of this case the Board has now considered the Intermediate Report, the Respondent's exceptions and briefs, and the entire record in the case. It has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the additions noted below. As the Respondent's position is adequately set out in the record, the exceptions and the briefs, we again deny its request for oral argument.

The Trial Examiner based his finding that Hatfield had made a full and unqualified tender of dues before his discharge, hence that the discharge demanded by Respondent was in violation of Section 8 (b) (1) (A) and (2) of the Act, upon the Board's decision in Aluminum Workers International Union (The Metal Ware Corporation), 111 NLRB 411, 112 NLRB 619, which has since been enforced by the United States Court of Appeals for the Seventh Circuit.[1] The Court's opinion makes no specific reference to the Board's construction of the Act that "a full and unqualified tender made any time prior to actual discharge, and without regard as to when the request for discharge may have been made, is a proper tender and a subsequent discharge based upon the request is unlawful." Reference is made by the Court to the obvious good faith of the employee in question and to her having made full tender before "the operative demand" for discharge, language which the Respondent here would construe as indicating a significant change from or rejection of the quoted Board construction of the Act. We do not so construe the Court's opinion. We view the Court's decision as an analysis of the particular facts in the light of the statutory purpose of Section 8 (a) (3) and (b) (1) to bar "free riders," and not as implying that tender is meaningless once a union has effectually, in the circumstances, demanded a discharge.

[1] 230 F. 2d 515, 37 LRRM 2640.

Since enforcement of the Aluminum Workers Case, we have applied the principle of recognizing a valid tender before actual discharge in a case involving the tender of an initiation fee. See Technicolor Motion Picture Corporation, et al., 115 NLRB 1607.[2] We there held that causing an employer to discharge an employer after tender of the initiation fee was a violation of Section 8 (b) (1) (A) and (2) of the Act. Frequent demands for discharge had preceded the fee payment and had continued up to the day on which the discharge actually occurred and on which, incidentally, the employee's membership application was accepted by the union. The Respondent contends that the present case is distinguishable from the Technicolor case because it never did accept Hatfield's tender of initiation fee and dues, thus refusing to waive late payment. We do not agree. We deem the Technicolor decision controlling. When it became clear on May 10, about the time the first request for discharge was received, that the Respondent would no longer postpone its demand that he join as it had the previous fall, Hatfield made several attempts to sign whatever was necessary for union membership and dues payment. On May 13 a job steward of the union, qualified to take Hatfield's application, did so. But on May 16 the union's business agent, who had already gotten membership approval for the discharge unknown to the job steward, again demanded the discharge on the ground that Hatfield was "ineligible for

[2]Member Bean notes his dissent in the Technicolor Motion Picture Corporation case, but wishes to state that he considers himself bound by that decision.

membership." No contention was made by the Respondent that the tender was insufficient, and, as found by the Trial Examiner, the Respondent had established a practice of accepting signed checkoff slips as a full and unqualified tender of initiation fees and dues. In the circumstances we find that Hatfield could not be deemed a "free rider" from the time on May 13 when he executed the checkoff slip supplied to him by the job steward and handed to the Employer's storekeeper in the customary manner. His discharge thereafter, on May 17, cannot be defended under the union shop agreement.

Having found no merit in the exceptions to the Intermediate Report filed by the Respondent, we shall issue the order recommended therein.

Order

Upon the basis of the above findings of fact and the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Woodworkers of America, AFL-CIO, Local Union No. 13-433, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Attempting to cause and causing Ralph L. Smith Lumber Company, its officers, agents, successors, and assigns, to discharge any of its employees except in accordance with the terms of a valid union-shop contract, or in any other manner attempting to

cause said Company, its officers, agents, successors, and assigns, to discriminate against any of its employees in violation of Section 8 (a) (3) of the Act.

(b) Restraining or coercing employees or prospective employees of Ralph L. Smith Lumber Company, or of any other employer, in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post immediately in conspicuous places in business office of International Woodworkers of America, AFL-CIO, Local Union No. 13-433, at Anderson, California, and in all places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix A."[3] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly

[3]In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing An Order."

signed by Respondent, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to said Regional Director signed copies of the aforesaid notice for posting, Ralph L. Smith Lumber Company willing, at the Company's woods operations where notices to its employees are customarily posted;

(c) Make Charles R. Hatfield whole for any loss of wages he may have sustained as the result of the unfair labor practices in the manner set forth in the Intermediate Report and Recommended Order in the Section entitled "The remedy";

(d) Notify the Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., Feb. 20, 1957.

[Seal] BOYD LEEDOM, Chairman,
ABE MURDOCK, Member,
PHILIP RAY RODGERS, Member,
STEPHEN S. BEAN, Member,
National Labor Relations Board.

[Note: Appendix is the same as Appendix A set out at pages 34-35 except for the words "Pursuant to a Decision and Order of the National Labor Relations Board."]

United States of America
Before The National Labor Relations Board
Case No. 20-CB-408

International Woodworkers of America, AFL-CIO, Local Union 13-433 (Ralph L. Smith Lumber Company, Employer) and Charles R. Hatfield, An Individual.

SUPPLEMENTAL DECISION

On February 20, 1957, the Board entered its Decision and Order in this proceeding[1] in which it found that Respondent Union had violated Section 8 (b) (1) (A) and (2) of the Act by causing the discharge of woods employee Hatfield under its valid union security agreement, at a time when Hatfield had made a full and unqualified tender of initiation fees and dues. In its opinion the Board referred as precedent to its decisions in Aluminum Workers International Union (The Metal Ware Corporation),[2] and in Technicolor Motion Picture Corporation,[3] wherein it held that a full and unqualified tender of dues and initiation fees at any time before actual discharge was a proper tender and a subsequent discharge unlawful. It also referred to the opinion of

[1] 117 NLRB 405.
[2] 111 NLRB 411, 112 NLRB 619.
[3] 115 NLRB 1607.

the United States Court of Appeals for the Seventh Circuit in the Aluminum case.[4]

Since issuance of the Board's Decision and Order in this proceeding, the United States Court of Appeals for the Ninth Circuit has, in the Technicolor case,[5] denied enforcement and ordered a remand. The Court interprets the union ship proviso to Section 8 (a) (3) of the Act as authorizing the execution of collective bargaining agreements which make time of the essence with regard to the tender of initiation fees within the thirty day grace period allowed by the proviso, holding that a belated tender under such an agreement, although made before actual discharge, will not avert a valid discharge—contrary to the Board's view. The Court declined to pass upon the contention that Respondents, in the particular circumstances of that case, were precluded from insisting upon their respective rights under the contract, stating that it would be sound policy for the Board rather than the Court to initiate any theory of waiver or preclusion in this area of the law. Thus the Court, although disagreeing with the Board's interpretation of the basic legal principle involved, recognized that particular cases may require relaxation of the rule.

We have carefully reexamined and reconsidered the entire record in this case in the light of the Techni-

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[4]N.L.R.B. v. Aluminum Workers International Union, Local No. 135, AFL, 230 F. 2d 515 (C.A. 7), March 2, 1956, 37 L.R.R.M. 2640.

[5]N.L.R.B. v. Technicolor Motion Picture Corporation, et al., 248 F. 2d 348 (C.A. 9), September 24, 1957, 40 L.R.R.M. 2660.

color court decision, and with all due respect to that Court, we adhere to our original decision and our interpretation of the Act. Moreover, even assuming that Hatfield's tender was belated, we nevertheless find that the Respondent accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge.

As stated in our earlier decision, Respondent had established a practice of accepting signed checkoff slips as a full and unqualified tender of initiation fees and dues, and Hatfield made such a full and unqualified tender to job steward Gordon on May 13, 1955. Gordon accepted it. Respondent contends, however, that its business agent rejected Hatfield's tender, and hence that it did not waive its contract right to insist upon timely payment. As we have said, we do not agree. Regardless of the fact that Respondent's business agent refused to accept Hatfield's membership application from ~~job~~ steward Gordon, and that he later, upon receiving the Employer's check covering Hatfield's initiation fee and dues pursuant to Hatfield's check-off authorization of the 13th, returned the check to the Employer, Respondent was bound by the actions of Gordon whom it had clearly authorized to sign up new members. Notices posted by Respondent to the lumber company employees concerning obligations under the union security agreement stated in part:

It is essential that new applicants for membership contact the Union Shop Steward in their department, or the Business Agent of the Union, and be prepared

to pay the Initiation Fee, which is $20.00 and $3.50 for a month's dues. A convenient Check-Off Card is provided for both Initiation Fee and monthly dues for your convenience.

Gordon defined his duty as a job steward as follows: "I am supposed to sign up the new men as they come to work, sign them up into the union."[6] This testimony was corroborated by Crimmins, the business agent. Furthermore, Respondent's Constitution and By-Laws contains nothing to negate this authority on the part of the job steward. Thus the Trial Examiner's finding (I.R. ftn. 11, 117 NLRB 413), that Gordon as job steward[7] for the Union was its agent, and that his actions and conduct as steward are attributable to it, is amply supported by the record. In the circumstances, we deem Gordon's acceptance of Hatfield's tender to have constituted acceptance by Respondent. Nor do we see that Gordon's testimony on redirect examination, that he "probably wouldn't have" signed Hatfield up had he known of the discharge letter, alters the effect of his having done so. Gordon was authorized to act for the Respondent in that capacity and he did so in the instance with which we are concerned. On this record we find that Respondent, by the action of its agent Gordon in accept-

[6]Gordon also testified that he had planned to sign up Hatfield and the two others who had not signed up in the fall, on May 3, but was prevented from doing so by his injury on May 2 and his stay in the hospital until May 12.

[7]The Trial Examiner referred to Gordon as the "woods shop steward"; actually Gordon testified that he was "a job steward" for the Union. In the context it appears that "woods shop" and "job" are synonymous.

ing the checkoff slip for initiation fees and dues tendered by Hatfield, waived its right to insist that Hatfield be discharged for failure to make a prompt tender.

For the reasons hereinabove stated, we affirm our Decision and Order of February 24, 1957, as supplemented herein.

Dated, Washington, D.C.,
February 24, 1958.

[Seal] BOYD LEEDOM, Chairman,
PHILIP RAY RODGERS, Member,
STEPHEN S. BEAN, Member,
JOSEPH ALTON JENKINS,
Member,
National Labor Relations Board.

(238 F. 2d 378.)

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board v. International Woodworkers of America, Local Union No. 13-433, AFL-CIO, August 6, 1956.

Before FEE, CHAMBERS, and BARNES, Circuit Judges.

Full Text of Opinion

PER CURIAM:—National Labor Relations Board has petitioned this court for summary entry of a decree enforcing its order in this case. Respondent International Woodworkers has filed a reply to the petition for summary entry of the decree, wherein it is set up that the Board affirmed the findings of the Intermediate Report and Recommended Order of the Trial Examiner without any consideration of the merits on the points raised in the exceptions of respondent thereto. It is also alleged that the Board did not make this summary adoption of the recommended order of the Trial Examiner for a week after it had actually received the exceptions of respondent thereto. The ground that the Board took was that the exceptions of respondent were not before it inasmuch as time was extended to respondent to have the exceptions in Washington on January 20, 1956, whereas the exceptions were not delivered to the Board until January 23, 1956. Respondent alleges on information and belief that respondent's exceptions actually were in Washington on January 20, 1956, but that they were not delivered to the office of the Board on that day because the office of the Board had closed at 4:00 p.m., on January 20, 1956, and did not reopen

until 9:00 a.m., on January 23, 1956. The Board gave no consideration to this matter and affirmed summarily without adjudication of the merits.

Heretofore we have held that the Court would not enforce an order of the Board summarily simply because the respondent did not appear here, but would examine the record in order to discover whether the order was a proper one for this Court to enforce. We are entitled to consider whether or not this case falls under Section 10(e) of the Act, which provides in part:

"No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court unless the failure or neglect to urge such objection should be excused because of extraordinary circumstances."

If the objection was not properly made before the Board or its agency, the circumstances recited by respondent are so extraordinary that the Board should have considered the objections.

In any event, this Court is of opinion that the order should not be enforced by us until the Board has passed upon the record itself. Under these circumstances, the order of enforcement is denied. The cause is remanded to the Board with directions to consider the matter on the merits, including the objections of respondent which are in its office.

While this Court does not disclaim its right to review the matter on the merits, National Labor Relations Board v. Cleff, 9 Cir., 214 F.2d 1, 34 LRRM 2314, it is considered better practice to require the Board to pass upon the questions first.

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, vs. International Woodworkers of America, Local Union No. 13-433, AFL-CIO, Respondent.	No. 16,089 Mar. 2, 1959

On Petition for Enforcement of an Order of the National Labor Relations Board.

Before: STEPHENS and ORR, Circuit Judges, and ROSS, District Judge.

ROSS, District Judge:

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended, for the enforcement of the Board's Order issued February 20, 1957, against International Woodworkers of America, Local Union No. 13-433. This is the second time this case has been before the Court. On the first occasion (238 F.2d 378), when the case was considered for summary entry of decree, the matter was remanded and the Board was directed to make a determination of the matter on the record. On remand the Board made new findings on the so-called "alternative" issues referred to by this Court in its

opinion in N.L.R.B. v. Technicolor Motion Pictures Corp., 248 F.2d 348. A portion of the Board's "Supplemental Decision" entered by it on February 24, 1958, after it had considered the record as directed by the remand order is as follows:

> We have carefully reexamined and reconsidered the entire record in this case in the light of the Technicolor court decision (decided September 24, 1957, and in which case this Court referred to "alternative" issues) and with all due respect to that Court, we adhere to our original decision and our interpretation of the Act. Moreover, even assuming that Hatfield's tender was belated, we nevertheless find that the Respondents accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge.

Briefly stated the facts show that Ralph L. Smith Lumber Company was engaged in a logging operation near Anderson, California. The camp was unionized under a collective bargaining contract between the Union and the Lumber Company, the employer, which contract had been entered into October 4, 1950. The contract required union membership as a condition of employment, Article II of the contract reading:

> ARTICLE II. Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the union, as a condition of employment, shall become and remain a member of the union. . . .

Hatfield, the employee with whom we are concerned, and two others, Thomas and Spangle, were working for the Company at the time of its fall shut-down. None of the three had union membership. When the

logging operations were resumed about the middle of March 1955, these three men resumed their former employment. On May 5, some six weeks after the spring reopening, Dickey, a union steward, asked Thomas, Spangle and Hatfield for their membership applications. Thomas and Spangle signed up then and there, but Hatfield stated that he was under the impression he had made an application the previous fall. No such application on the part of Hatfield was found, and the next day, May 6, a demand was made on the Company for the discharge of Hatfield. Following this first demand for discharge the events hereinafter related took place, culminating in the acceptance of Hatfield's application for membership by the regular job steward, Gordon, who until then had been hospitalized and off the job. Later the application was returned to Hatfield by the Union with the statement that the procedure was illegal and unacceptable to the Union, and for the second time a demand was made on the Company for Hatfield's discharge. The request was complied with.

The issue is whether under these circumstances the Board properly found that the acceptance of the tender of Hatfield's application for membership, and the acceptance by the Union steward under such circumstances, constituted a waiver by the Union of its right thereafter to demand Hatfield's discharge under its union-security agreement.

In view of our holding that in this type of case much weight must be accorded the factual background, we set out the pertinent facts in chronological order.

March 15, on or about, the Company resumed its logging operations which had been closed down the previous fall. Hatfield and his two companions, Thomas and Spangle were re-employed.

May 5, Dickey, a Union steward, requested Hatfield, Thomas and Spangle to sign union membership cards. Thomas and Spangle complied. Hatfield did not, stating that he believed that he had signed such a card the previous fall. An immediate search of the Union records failed to disclose any such previous application on the part of Hatfield.

May 6, 1955, one Crimmins, a union official wrote the Company requesting Hatfield's discharge for not having joined the Union. Hatfield had not been advised of the fact that no membership card had been found. On being informed by a Company officer that the Union had requested his discharge Hatfield stated that he was willing to join the Union. As a part of this conversation he, Hatfield, was advised that he should see Dickey, a Union Steward, for the purpose of making his application for membership, it being pointed out that the regular steward, Gordon, was ill. Hatfield stated that it was difficult for him to get from the woods to camp to see Dickey but that he would make every effort to do so, contact Dickey there, and sign up.

May 10. Hatfield went into camp after work but Dickey was out fishing so there was no contact, but on Dickey's return one Watson, recording secretary of the local, advised him that Hatfield had been looking for him in order to sign up.

May 11. Before going to work Hatfield met one Johnston in the Company store, and asked Johnston to sign him up. Johnston stated he was not authorized, and for him to see Dickey.

May 11. After work Hatfield went to Dickey's house for the purpose of signing up but Dickey was not at home.

May 11. At an evening monthly meeting of the local, Crimmins, the Union official who had on May 6 written the Company requesting Hatfield's discharge, asked for and received ratification for his act from local union members. At the meeting which resulted in ratification of Crimmins' act demanding discharge of Hatfield the union members present were not advised of Hatfield's effort to sign up.

May 12. Before the bus started to the woods with the men in the morning Hansen, a Company employee, told Dickey, who was on the bus, that he would like to get the Hatfield "mess" straightened out. Dickey replied that the matter was out of his hands. About this time Hatfield saw Dickey on the bus, went over, and asked for a membership application to sign. Before Hatfield could reply the bus pulled out for the woods. Hatfield then went to the Company store, signed a statement to the effect "I have offered to join the Union as soon as the papers are offered to me to sign I will do so." (R. 233) He gave this note to Hansen, a Company employee, who in turn delivered it to the Company's logging superintendent. During the day Hatfield saw Dickey in the woods and asked him for the necessary papers for him to sign. Dickey's

answer was that at a meeting the previous night Crimmins' action demanding Hatfield's discharge had been ratified, and the matter was now beyond his control.

May 12. In the morning Gordon, the steward who would ordinarily have handled the application matter, returned after an absence caused by illness. He was advised of the Hatfield situation. Gordon then said that under the circumstances he would sign Hatfield into the Union. Hatfield, later in the same day, signed a letter addressed to the Company for the attention of Hansen. The letter advised that there was enclosed Hatfield's authorization for deduction of Union dues and initiation fees duly signed as "nunc pro tunc" to November 1, 1954. It further advised Hansen, the Company man, that he was authorized to make the "check-off." A short time later on the same day Gordon, the steward, entered the Company store and was given Hatfield's letter. He then went into the woods, found Hatfield, and the necessary papers were signed, including the application for membership and the "check-off" card. Gordon signed these documents as "Job Steward, International Woodworkers of America, Local 13-433." Later, at Hatfield's request, a new check-off slip was signed and the former one, which made the check-off effective back to November of 1954, was destroyed. It was then delivered to the Company via Johnston.

May 14. Gordon, the steward, advised Crimmins, a Union official, that he had signed up Hatfield, and attempted to deliver to him Hatfield's application for union membership and copy of the check-off slip.

Crimmins did not question Gordon's authority to sign up Hatfield but stated that he "wished" that he, Gordon, had not signed up Hatfield because he, Crimmins, had written the Company demanding Hatfield's dismissal. He told Gordon to keep the documents "for awhile."

May 16. Crimmins wrote the Company again, stating that he had received the so-called "nunc pro tunc" letter written by Hatfield on the 13th of May, that the procedure was illegal and unacceptable to the Union, and that he again demanded the discharge of Hatfield under the "discharge" clause of the contract between the Union and the Company.

May 17. The Company complied with the discharge request of May 16.

May 20. The Company at Hatfield's request sent the Union a check for $23.50 for initiation fees, plus dues for the month of May. The check was returned by the Union, with the statement that Hatfield was not a Union member and was not eligible for membership.

July 14. Hatfield was reinstated by the Company.

July 21. Hatfield's attorney sent the Union a check for $30.50 to cover Hatfield's initiation fees, plus dues for April, May and June. The check was returned with the advice that Hatfield was not eligible for membership. The Company later discharged Hatfield for cause.

In its brief the Union states "most of the facts are undisputed. Respondent has read the Board's state-

ment of the facts contained in its brief. There is no serious disagreement with this statement . . ." At this point we quote from NLRB v. Aluminum Workers, 230 F.2d 515, 517. "The facts are not largely in dispute; the controversy is as to the legal concepts which spring from them."

Since there has been much discussion, both in the briefs and during oral argument, of the Technicolor case, N.L.R.B. v. Technicolor Motion Picture Corp., 248 F.2d 348, decided by this Court September 24, 1957, we turn directly to that case to take our bearings. The facts there were as follows: A similar union-security provision was contained in the contract between the Union and Technicolor, the employer. One Balthrope, an employee of the Company, did not apply for membership in the Union or tender his initiation fees during the thirty day period though he knew of the union-security provisions of the contract. The contract had been executed on July 31, at which time Balthrope was in Company employ. On August 31, 1954, the Union made a written demand on the Company for the discharge of Balthrope. No action was taken by the Company on the demand. Repeated demands were made by the Union for Balthrope's discharge during a period extending into January of the next year. All demands went unheeded. "Meanwhile, on December 7, 1954, after steadfastly refusing to do so for four months, Balthrope applied for Union membership" and tendered his initiation fee. (P. 350)

On February 1, 1955, the Company discharged Balthrope, whereupon he lodged his complaint before

the Board alleging that the Union by causing the Company to discharge him after he had paid his initiation fee violated Sections 8(b)(1)(A) and 8(b)(2), and that the Company by yielding to the Union's demand violated Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The Board found for the employee Balthrope and against the Union and Technicolor.

In its review of the Board's ruling in the Technicolor case this Court observed that the Board in reaching its decision in that case had relied upon the "broad doctrine promulgated by Aluminum Workers case, N.L.R.B. v. Aluminum Workers International Union, a Seventh Circuit Case reported in 230 F.2d 515." The Court then, 248 F.2d at page 350, cited the following from the Aluminum case, which involved an employee purportedly delinquent in the payment of her periodic union dues:

> . . . a full and unqualified tender made any time prior to actual discharge, and without regard as to when the request for discharge was made, is a proper tender and a subsequent discharge based upon the request is unlawful.

Adverting then to the discussion of the situation in the Technicolor case this Court said:

> Our initial concern is, of course, with the germane provisions of the Act and, for purposes of clarity, we deem it desirable to set forth those subsections at the outset of our discussion. The first proviso to Section 8(a)(3), which sanctions union security agreements, has been noted already. Section 8(a)(1) (relating to the employer) and Section 8(b)

(1)(A) (relating to he union) make it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;" which include "the right to refrain" from union activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." Further, Section 8(a)(3), made applicable to unions by Section 8(b)(2), prohibits an employer from "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" except as provided in the succeeding proviso authorizing union security agreements. Even under such a union security agreement any discrimination based on non-membership is strictly limited. An employee need only tender his initiation fee and periodic dues to avoid discriminatory action including, of course, discharge. This is made clear by the second proviso to Section 8(a)(3) that under a union security agreement an employer cannot justify discrimination against an employee for non-membership in the union if he has reasonable grounds for believing that such membership "was not available to the employee on the same terms and conditions generally applicable to other members, or * * * was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Likewise, a union is forbidden by Section 8(b)(2), "To cause or attempt to cause an employer to discriminate against an employee in

violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

We understand the Board's position to be that the above statutory provisions embody Congressional recognition of the problem of so-called "free riders;" (i.e., those employees who enjoy the benefits of union representation under union agreements without contributing to the financial support of the union by paying initiation fees and periodic dues), and authorization to deal with this problem by permitting unions operating under such agreements to cause the discharge of those employees who are "free riders;" that Balthrope was such a "free rider" after the expiration of the thirty day grace period; that under the Act and the collective bargaining agreement the power was vested in the Union to cause, and the Company to effect, a lawful discharge of Balthrope so long as the initiation fee remained due and untendered; that upon tender of his initiation fee Balthrope ceased to be a "free rider," and concomitantly the power to discharge him was lost; that any subsequent demand by the Union for his discharge was necessarily for a reason other than the failure to pay the initiation fee, and similarly, his discharge was for a reason other than the failure to pay the initiation fee; and hence both the Union and the Company were guilty of the unfair labor practices as charged.

Respondents assert that the Act allows execution of a collective bargaining agreement re-

> quiring an employee subject to a union security contract to join the union or at least tender his initiation fee within the thirty day grace period; that this statutory authorization enables a union to insist upon the timely submission of uniformly required initiation fees; and that an employee who fails to tender his fee within the required period cannot by a tardy attempt to meet his contractual obligation forestall his discharge for failure to comply with the terms of the agreement. (Pages 350-353)

We cite further from our opinion in the Technicolor case as follows:

> If the employee pays his fees and dues he is protected from discharge. The critical question, and the one which causes a divergence of viewpoint, is whether the union security agreement proviso which empowers unions and employers to make agreements by the terms of which employees are required to join the union within the thirty day grace period (and an agreement executed thereunder) means that the employees must join the union during this period in order to avert possible discriminatory treatment or whether it is enough that they join at any time prior to actual discharge. Neither the literal language of the Act itself nor its legislative history furnishes an explicit answer to this precise issue. (Page 352.)

This Court then went on to say that time was of the essence of the thirty day so-called period of grace, and that "on its face the proviso permits agreements which 'require' employees to initiate union membership within a specified time," and concluded "we be-

lieve (this indicates) a Congressional intent to permit discrimination based on the failure to tender uniformly required initiation fees where the employee has not fulfilled his obligation within the period expressly granted for his protection." (Page 353.)

There then follows a discussion of the Taft-Hartley Act. We further stated:

> Although the legislative materials contain no explicit reference to the effect of late tender of initiation fees on the power to cause discharge or to discharge an employee who breached his obligation to tender the fees within the specified time limitation authorized by the statute and provided for in the contract, the implication is strong from the great importance attached to the grace period that timely tender is required to prevent a lawful discharge of the employee in the absence of circumstances which forestall the union or employer from relying on the employee's failure to pay the fees. (Page 353)

Continuing, we said that the Board adopted this construction of the Act in the beginning and consistently followed it until the Aluminum Workers case, decided by the Seventh Circuit, March 2, 1956, caused it to leave the path of rectitude and follow the doctrine enunciated therein, which doctrine the Second Circuit Court of Appeals in the International Ass'n of Machinists v. N.L.R.B., 247 F.2d 414, 420, said was "an incorrect statement of the law." The Machinists case held that a union could lawfully compel the discharge of a delinquent member under a union security agreement despite a belated tender of dues.

It is to be observed that the Aluminum case and the Machinists case both deal with failure to pay dues. In this Hatfield case we are concerned with application for membership.

So far as the fate of this, the Hatfield, case is concerned, the most important discussion made by this Court in the Technicolor case revolves around the so-called "alternative ground" to support the Board's ruling. See page 355 of that reported opinion. In that connection we pointed out that an oral argument there was the contention that the conduct on the part of both the Union and the Company precludes them from asserting their respective rights under the collective bargaining agreement. Our comment on this discussion was:

> Careful attention and consideration has been given this argument. It is not without appeal or merit. But the conclusion seems inescapable that it cannot be supported by the record now before us. . . . For . . . the General Counsel raised no issue concerning waiver, acquiescence, or similar conduct on the part of either Respondent. Thus the preclusion argument addressed to this Court was not raised, argued or decided in the proceedings to date. (Page 355)

We concluded that "an employee must not remain perpetually vulnerable to discharge because of tardiness in submitting initiation fees, irrespective of the conduct engaged in by the union or the employer."

> Either the employer or the union may by its actions be estopped from asserting its particular rights under the collective bargaining agreement.

> But inherent in making such determination is the balancing and accommodation of different interests and various factors based on policy considerations. (Page 356)

It being apparent that the Board had not considered the "alternative ground" at its hearing, and consequently could not have then predicated its ruling thereon, we said

> We believe that under the circumstances here existing this issue (alternative grounds) should be considered in the first instance by the Board, (Page 356)

and not by this Court for the first time on appeal. The Technicolor case was then disposed of by remanding it to the Board for such further proceedings as it might deem justified in the light of the views we had expressed in the opinion. Previously we had remanded this instant case back to the Board which Board, at the time of entering its Supplemental Decision of February 24, 1958, had before it the views we had expressed in the Technicolor opinion. Our remand of this Hatfield case on its first appearance before us was on August 6, 1956. Our remand in the Technicolor case was on September 24, 1957. There the Board had before it our discussion of the Technicolor case when it entered its supplemental decision, wherein it said:

> We have carefully reexamined and reconsidered the entire record in this case in the light of the Technicolor court decision, and with all due respect to that Court, we adhere to our original decision and our interpretation of the Act. More-

over, even assuming that Hatfield's tender was belated, we nevertheless find that the Respondent accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge.

We are convinced on the facts of this case that the findings of the Board in its supplemental decision are supported by the record, and that, irrespective of its deferential disagreement with this Court on the interpretation of the Act, the finding of the Board to the effect that the respondent accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge, is a sufficient finding supported by the facts.

There has been some discussion as to whether the doctrines of (1) waiver and/or (2) estoppel applied here. It seems academic to enter into that discussion now, since the application of either would sustain the Board's position, namely, that the discharge of Hatfield under the circumstances as appearing in the record, was unlawful. We would support this conclusion by way of waiver rather than estoppel. The latter is an equitable rather than a legal defense. Words and Phrases, 1950 Edition, Volume 15, page 607.

We think, however, that this case can be decided on the principles of agency. As we see it, there is nothing in the record limiting the power of stewards to accept applications for membership. That was their job. If an employee was subject to discharge for non-membership, then it is a corollary of that fact that there always be available to him on the job persons authorized to accept his application. There being no

limitation of authority then every steward acted within the scope of both his real and apparent authority when he accepted an application for membership. His was but a ministerial duty.

Nowhere in the record is there any intimation that in the acceptance of applications a steward had any discretionary or quasi-judicial functions. He could not pass upon the merits of the application—his sole duty was to make himself available to the workers to the end that applications could be made to him. Thereafter his only authority was to process the application; that is, to forward the application and money on to the proper Union officials. Such being the situation, we are of the opinion that the Union was bound by the acts of its agents, and that when Hatfield's application was made to and accepted by Gordon, he, Hatfield, had done all that was required of him at that point. And Gordon, in accepting the application in the course of his employment, and under the specific authority vested in him as a steward, acted legally in accepting it, and thereby bound the Union. At this point the matter was closed, and the discharge provision could no longer be invoked. On this reasoning there is no need of calling the doctrines of waiver and/or estoppel into play.

But assuming for the purpose of argument that there was some nebulous restriction that might have been asserted by the steward, Gordon, which he might have stood upon in refusing Hatfield's application, the fact is that he did not do so. This, then, would amount to a waiver.

On the alternative ground of "waiver" alluded to by us in the Technicolor case, we there said "careful consideration has been given to this argument. It is not without merit." In the Technicolor case we said "But the conclusion seems inescapable that it (waiver) cannot be supported on the record now before us." (Page 355) Here, in the Hatfield case, we are satisfied that the finding of waiver by the Board is supported by the record.

It is conceded that the Union could have lawfully requested the discharge of Hatfield and his two companions within the thirty-day period. However, it did not do that. Thomas and Spangle were permitted to make applications which were accepted approximately two months after the spring reopening. It is obvious that the thirty-day rule was not always followed, and it appears that here at least the Union exercised the personal right of waiver. Hatfield, instead of instantly signing the application for Union membership along with Thomas and Spangle, raised the question of his former application. So far as we know the point was honestly raised, though a search of the Union records revealed that no such application had been made. This being ascertained by the Union, demand was made for Hatfield's discharge the very next day. Why, after waiving as to Thomas and Spangle, was the Union so "hell-bent" as to stand on ceremony with Hatfield? Under the standard of fair treatment, which both the Wagner and the Taft-Hartley Acts invoke, the least that the Union officials could have done would have been to advise Hatfield that no former application

had been found, and give him an opportunity then to make, or refuse to make, an application for membership.

We are not particularly impressed with the various arguments presented by Respondent's brief. It concedes that "most of the facts are undisputed," and states that it has no serious disagreement with the Board's statement of facts. The first argument advanced is that respondent should have had an opportunity to offer further testimony going to the alternative theory of waiver. The motion to reopen was denied by the Board. Without going into detailed discussion, we are of the opinion that a reopening of the case before the Board would have added nothing substantial to respondent's case. We are satisfied that all of the material facts were presented to the Board at the orginal hearing. We adopt the language used in the Board's reply brief. "The facts which respondent seeks to adduce (on its motion to reopen) would be completely irrelevant to the issues of the case." We hold that the Board properly denied respondent's motion to reopen.

Respondent presents its views on the theories of estoppel and waiver. We agree that this was not a situation where estoppel would lie. We have said that in our opinion it was not necessary to invoke "waiver" to sustain the Board's order, but if such had been required we are convinced that, regardless of how the Respondent spells out the elements of waiver and points out that waiver could not come into play by reason of the absence of certain of the so-

called necessary elements, the acts and conduct of the Union agents, especially the acceptance by Gordon of the Hatfield application for membership, together with his money for initiation fee, and the check-off card, did amount to a waiver of any "special" instructions or authority that might have permitted him to act to the contrary.

Respondent discusses the Technicolor case, at some length. We do not think the holding of this Court in that case precludes the Court from holding to the contrary on the facts here presented, nor does our opinion herein expressed amount to an overruling by this Court of its ruling entered therein. The two cases are clearly distinguishable on their facts. In this particular type of case much importance must necessarily be attached to the factual background. This Court does not depart from its ruling in the Technicolor case upon the facts therein found, nor does it disagree with what the Seventh Circuit said in the International Ass'n of Machinists case. We do hold, however, that the rulings laid down in those two cases do not fit every fact situation, and surely they do not fit the fact situation presented here. We reiterate that the facts dictate the law to be applied. These cases must be recognized for what they are—they are concerned not only with the right to secure union membership, but also with the right of men to work, which means to eat, and so to sustain life. Therefore, there can be no dogmatic application of any one set of rules. Rather there are certain generally recognized principles, referred to in the cited cases, which are to

be tempered to fit the need of the particular factual background of each case.

We do not believe that the spirit or the letter of the Wagner and Taft-Hartley Acts, under whose provisions this type of collective bargaining contract with its thirty day provision as to union membership, is allowed, was intended to justify a Union to permit the thirty day period to go long past, and having accepted the membership of certain employees, refuse to accept, or reject, the application of other employees similarly situated. To permit such a practice would, in our opinion, sanction the very thing the provisions of these Acts seek to avoid, and would allow to be done through the back door what could not be done through the front.

The right to enjoy the blessings of life, liberty and the pursuit of happiness is founded on the right to work. Deprived of that right, man becomes a groveling animal. This being true, it follows that every statute, decision, contract, rule or decree impinging upon that right should be carefully scrutinized and as carefully construed. Even without the warning provisions of the Wagner Act and Sections 8(a)(3) and 8(b)(2) of the Taft-Hartley Act, we should be inclined to interpret the "non-membership" provisions of this type of union-employer contract in such a manner as to eliminate, so far as possible, the inherent harshness of such a provision. However, we need not base our approach to this problem on any court-conceived philosophy of human kindness, for Congress recognized the danger inherent in any agreement whereby a man

can be deprived of his right to work under color of law. Its views are explicit in the provisions of the Wagner and Taft-Hartley Acts.

For the reasons hereinabove given, we are of the opinion that the order of the Board entered on February 20, 1957, as supplemented by its decision of February 24, 1958, should be, and it is hereby ordered ENFORCED.

(Endorsed:) Opinion. Filed Mar. 2, 1959.
Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, vs. International Woodworkers of America, Local Union No. 13-433, AFL-CIO, Respondent.	No. 16,089

DECREE

Before: Stephens and Orr, Circuit Judges, and Ross, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against International Woodworkers of America, AFL-CIO, Local No. 13-433, its officers, representatives, agents, successors, and assigns on February 20, 1957, as supplemented by its decision of February 24, 1958, pursuant to the Court's remand. The Court heard argument of respective counsel on January 6, 1959, and has considered the briefs and transcript of record filed in this cause. On March 2, 1959, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order, as supplemented by the decision of February 24, 1958. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the said order of the National Labor Relations Board in said proceeding be, and the same is hereby enforced; and that said International Woodworkers of America, AFL-CIO, Local Union No. 13-433, its officers, representatives, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

Endorsed. Decree Filed and Entered Apr. 27, 1959

/s/ Paul P. O'Brien
Paul P. O'Brien,
Clerk

A TRUE COPY
ATTEST:
Paul P. O'Brien,
Clerk